

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 4, 2005 Session

ELIZABETH DIAZ GRAHAM v. CHRISTOPHER SCOTT GRAHAM

Appeal from the Circuit Court for Bradley County
No. V-00-082 John B. Hagler, Judge

No. E2004-02247-COA-R3-CV - FILED JUNE 22, 2005

Elizabeth Diaz Graham (“Mother”) and the parties’ two minor children moved to Georgia in early 2000 following Mother’s separation from Christopher Scott Graham (“Father”). When the parties were divorced, the Trial Court expressly sanctioned Mother’s move to Georgia. In June of 2004, Mother abruptly moved to Jacksonville, Florida, without first notifying Father. Father filed a petition objecting to Mother’s relocation. Following a hearing, the Trial Court concluded that Tenn. Code Ann. § 36-6-108 applied, that Mother had no reasonable purpose for relocating to Florida, and that it would be in the best interest of the children for Father to be designated as the primary residential parent. We conclude that the preponderance of the evidence weighs against the Trial Court’s conclusion that it would be in the best interest of the children for Father to be designated as the primary residential parent.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit
Court Affirmed in Part and Reversed in Part; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

James F. Logan, Jr., Cleveland, Tennessee, for the Appellant Elizabeth Diaz Graham.

Randy Sellers, Cleveland, Tennessee, for the Appellee Christopher Scott Graham.

OPINION

Background

Mother and Father were married in June of 1993 and have two daughters, ages six and nine. The parties separated in January of 2000, and Mother filed a complaint for divorce shortly thereafter. As grounds for divorce, Mother alleged that Father was guilty of inappropriate marital conduct or, in the alternative, that irreconcilable differences had arisen between the parties. Mother sought, among other things, to be designated the primary residential parent for the two children. Father answered the complaint and filed a counter-complaint seeking a divorce from Mother based on allegations of inappropriate marital conduct and inhumane treatment. Father likewise sought to be designated as the children's primary residential parent.

The trial was in March of 2001 and, as relevant to this appeal, the Trial Court's judgment states as follows:

The divorce should be granted to both parties as each party seeks a divorce. It is the determination of the Court that the husband is guilty of greater fault and the Court cannot fault the wife for moving to her mother's. In fact, both parties went to their respective parents. The Court finds that the wife's moving to her mother's was reasonable under all of the circumstances and the removal to her mother's in the State of Georgia was not for the purpose of being vindictive and the children had suffered no harm. In fact, the father has had more than standard visitation with the assistance of the mother.... The Court adopts the Parenting Plan submitted by the mother with the mother to remain as the primary residential parent and primary caretaker. The Court finds that she has been the primary caretaker.

Father's child support payment originally was set at \$107.00 per week. However, the Trial Court stated that the amount would be reviewed in six months and "increased as the Court believes that [Father] is significantly underemployed." In accord with this ruling, Father's child support payment later was increased to \$150 per week beginning in September of 2001.

In February of 2004, Father filed a motion seeking to have his child support payments reduced. Father alleged that there had been a material change in his income, that he then was earning only \$9.50 per hour, and that his child support payments accordingly should be reduced to \$102.09 per week. Mother responded to this motion by claiming that Father was capable of earning an income sufficient for him to pay child support in the amount ordered by the Trial Court. Mother also requested the Trial Court to hold Father in contempt for willfully failing to pay the full amount of child support as previously ordered.

While the dispute regarding the amount of Father's child support obligation and potential arrearages was pending, Mother suddenly moved from Atlanta, Georgia, to Jacksonville, Florida. Father filed a Petition Objecting to Relocation. Father claimed Mother moved to Florida out of vindictiveness and spitefulness and for the sole purpose of defeating his co-parenting rights. Father further claimed that Mother was in violation of the Parental Relocation Statute, Tenn. Code Ann. § 36-6-108, and that either Mother should be required to return to Georgia or primary residential custody of the children should be transferred to Father. Father later amended the petition to claim that there had been a material change in circumstances and a change in custody was in the children's best interests, regardless of whether Mother returned to Georgia.

Mother responded to Father's petition claiming she was not being vindictive or spiteful when she moved to Florida and that there were several legitimate reasons for her relocation. First, Mother stated that the parties' younger daughter has a serious asthma condition and the treating physician in Georgia indicated that a climate such as that in Jacksonville would be better for the child. Second, Mother stated that her job in Georgia required her to work on the weekends, one evening per week, and on holidays. The job she accepted in Jacksonville required her to work only 8:30 a.m. to 5:00 p.m. on Monday through Friday, thus allowing Mother more time to spend with the children. Finally, Mother claimed she informed Father of her impending move as soon as she was offered employment in Jacksonville, and that the children were desirous of making the move to Florida. Mother also denied there had been a material change in circumstances warranting any change in custody.

A hearing was held in August of 2004 on the various pending motions. Mother testified at the hearing that she lived with her mother in Decatur, Georgia, at the time of the divorce. After the divorce, Mother moved to Suwanee, Georgia, on the outskirts of Atlanta and, most recently, to Jacksonville, Florida. Mother worked for State Farm Insurance ("State Farm") while in Georgia. In late April of 2004, she applied for a transfer to State Farm's offices in Jacksonville. Mother was selected for that job approximately two weeks later on May 16, 2004. Mother admitted that she did not inform Father that she had applied for a job in Jacksonville.

According to Mother, she had not sought a transfer prior to learning of the job opening in Jacksonville, and the reason she applied for that position was because her younger daughter's doctor recently had told Mother that a change in environment would be good for the child's asthma. Mother was required to obtain a humidifier and keep it running in the house to help with the child's asthma. Mother claimed she informed Father of the need for him to obtain a humidifier, but he refused to do so even though Mother offered to buy it for him. Mother added that the younger child took medication for her asthma while they were living in Georgia, but she has not needed any medication since moving to Florida.

Mother did not inform Father before she actually moved to Florida that she was planning on moving. Mother stated that it was her understanding that she did not need Father's permission to move to Florida, only that she was required to inform Father of her new address.

Mother married Jason Lewis (“Lewis”) one week after she applied for the job in Jacksonville. Mother worked with Lewis at State Farm in Georgia. Lewis also managed a Blockbuster video store in Georgia before the move. Lewis currently manages a Blockbuster video store in Florida. Because Lewis now is working only one job, he is “temporarily” earning less since moving with Mother to Florida. Mother stated that the cost of living in Jacksonville is lower than the cost of living in the Atlanta area, plus Florida does not have a state income tax. Mother’s new residence is located in a gated apartment community. Mother is able to spend more time with the children because of her new work schedule. Mother has thirteen to fifteen relatives in the Jacksonville area. Although Mother’s parents continue to live in Georgia, her Father has symptoms of Alzheimer’s disease and interacts very little with his grandchildren, sometimes forgetting who they are.

The children have done well in school while in Mother’s care. Mother stated that the children have perfect attendance at school. The older child has been on the honor roll several times. The most recent report card for the older child had all A’s except for one B.

Father also testified at the hearing.¹ According to Father, he did not learn that Mother was moving to Florida until June 1st, after Mother and the children already had moved. Father acknowledged that Mother had told him that her lease was about to expire and she would be moving, but he assumed she would stay in the Atlanta area. Father testified to several problems he has experienced as a result of Mother’s lack of cooperation as related to the difficulties encountered by the parties in having to drive farther to drop-off and pick-up the children. Father acknowledged that his younger daughter has asthma, that she has been treated by a physician, and that he has medication for her to take when she is with him in East Tennessee. Father stated that he did purchase a humidifier for his home. Father recently moved to a new residence, although remaining in the Cleveland, Tennessee, area. On the second day of the hearing, Father was asked if he had informed Mother of his new address and he responded that he had not, and “Today’s the day.” Father stated he did not know of Mother’s work schedule in Florida.

Following the hearing, the Trial Court’s first held that it had subject matter jurisdiction over custody issues surrounding the children, a holding not challenged on appeal. Next, the Trial Court determined that the Tennessee Parental Relocation Statute governed Mother’s relocation from Georgia to Florida. The Trial Court then concluded that Mother had violated the Parental Relocation Statute by moving to Florida without notifying Father of her intentions. According to the Trial Court, Mother had no reasonable purpose in moving to Florida. In a nutshell, the Trial Court essentially stated it did not believe Mother’s assertion that her primary motivation for moving to Jacksonville was to benefit the younger child’s asthma condition. Because there was no reasonable purpose for moving to Jacksonville, the Trial Court concluded that Mother’s

¹Most of Father’s testimony was devoted to matters not directly at issue on this appeal. For example, Father testified about his employment history, his current employment status, as well as his recent attempts to secure new employment. This testimony was relevant to what Father was required to pay in child support but is not directly at issue here. A substantial amount of Father’s testimony also centered around the parties’ compliance, or alleged lack thereof, with the final divorce decree regarding payment of marital debt. These matters, likewise, are not at issue on appeal.

motivation must, therefore, be vindictive and with the intent of defeating Father's visitation rights. The Trial Court reached this conclusion notwithstanding its concurrent finding that Mother had been "very good about allowing the father time with the children" (emphasis added). After finding Mother had violated the Parental Relocation Statute, the Trial Court stated that Mother should return to Georgia. The Trial Court held that Mother's moving to Florida would constitute a material change of circumstances if she did not return to Georgia. Having found the existence of a material change of circumstances if Mother remained in Florida, the Trial Court also held that it would be in the children's best interests for Father to be designated the primary residential parent if Mother stayed in Florida. The Trial Court added that if Mother did return to Georgia, the Trial Court would "have to consider the father's petition for change of custody only, and he, of course, would have to prove a material change of circumstances and then prove that it was in the best interests of the children for the Court to change custody." Finally, the Trial Court held that if custody was not changed, Father's child support obligation would remain the same and he owed an "otherwise unchallenged amount of \$4,494.00 in child support which shall be paid within thirty (30) days."

Mother informed the Trial Court that she would remain in Florida, the Trial Court's judgment was designated as a final judgment, and Mother now appeals. Although not stated exactly as such, Mother claims the Trial Court erred when it concluded: (1) that she did not have a reasonable purpose for moving to Jacksonville; (2) that there had been a material change in circumstances; and (3) that it was in the best interests of the children for Father to be designated as the primary residential parent.²

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Resolution of this appeal centers around the Parental Relocation Statute, Tenn. Code Ann. § 36-6-108. This statute contains several requirements for a parent such as Mother intending to relocate with his or her child. Initially, § 36-6-108(a) requires the relocating parent to send a notice to the other parent containing certain specific information, including the right of the non-relocating parent to file a petition opposing the relocation. If the parents are unable to agree on a

² Mother also claims the Trial Court erred in entertaining Father's request for a change in custody because the parenting plan requires that disputes be resolved by arbitration, except those involving child support. In response, Father correctly argues that because Mother never raised this argument in the Trial Court, the issue is waived. *See In Re Adoption of E.N.R.*, 42 S.W.3d 26, 32 (Tenn. 2001) ("It has long been the general rule that questions not raised in the trial court will not be entertained on appeal....") (quoting *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983)); *Mallicoat v. Poynter*, 722 S.W.2d 681, 682 (Tenn. Ct. App. 1986) ("The jurisdiction of this court is appellate only and we consider those issues which are timely brought to the attention of the trial court.").

new visitation schedule, then the relocating parent is required to file a petition “seeking to alter visitation.” Tenn. Code Ann. § 36-6-108(b).³ If the parents spend “substantially equal” intervals of time with their child and the relocating parent seeks to move with the child, then the court is required to determine whether to permit relocation based on the best interests of the child. The statute contains eleven non-exclusive factors to be considered when making a best interest analysis. *See* Tenn. Code Ann. §§ 36-6-108(c)(1) - (11).

If the parents are not spending “substantially equal” intervals of time with the child and the parent spending the greater amount of time seeks to relocate with the child, relocation “shall” be permitted unless the court finds one or more of the three factors listed in Tenn. Code Ann. § 36-6-108(d) are present. These three factors are:

- (1) The relocation does not have a reasonable purpose;
- (2) The relocation would pose a threat of specific and serious harm to the child which outweighs the threat of harm to the child of a change in custody; or
- (3) The parent’s motive for relocating with the child is vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child.

Tenn. Code Ann. §§ 36-6-108(d)(1) - (3). A trial court is required to undertake a best interests analysis under Tenn. Code Ann. §§ 36-6-108(d) and (e) only if it finds at least one of these three factors are present. According to the statute:

If the court finds one (1) or more of the grounds designated in subsection (d), the court shall determine whether or not to permit relocation of the child based on the best interest of the child. If the court finds it is not in the best interests of the child to relocate as defined herein, but the parent with whom the child resides the majority of the time elects to relocate, the court shall make a custody determination and shall consider all relevant factors

Tenn. Code Ann. § 36-6-108(e).

In the present case, the children were spending substantially more time with Mother who was designated as the primary residential parent. Accordingly, her relocation “shall” be

³ The Trial Court concluded Mother violated the statute by not giving Father the required notice. However, the Trial Court required Mother to file a notice specifying her intentions regarding staying in Florida or returning to Georgia. Father, obviously, availed himself of the right to file a petition objecting to the relocation. Accordingly, we deem Mother’s initial failure to give Father proper notice as having been cured.

permitted unless one or more of the three factors listed in Tenn. Code Ann. § 36-6-108(d)(1) - (3) are present. The Trial Court found two of these three factors to be present when it held that the move did not have a reasonable purpose, and that Mother's motive for relocating was vindictive and intended to deter or defeat Father's visitation rights. The Trial Court's conclusion that the move did not have a reasonable purpose was based primarily on credibility determinations and a disbelief of Mother's stated purpose for the move. In *Wells v. Tennessee Bd. of Regents*, our Supreme Court observed:

Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

Wells v. Tennessee Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999). We note, as did the Trial Court, that Mother introduced no medical proof establishing that the younger child's doctor had suggested a move to a different climate to help with that child's asthma. Mother's bare testimony was the only proof offered at trial regarding her motivations, testimony the Trial Court chose not to credit. We are, therefore, unable to conclude that there is "clear and convincing evidence to the contrary" and must affirm the Trial Court's credibility determination and resulting conclusion that the move did not have a reasonable purpose.

A parent's motivation for relocating can be deemed vindictive under the statute only if it is intended to defeat or deter the other parent's visitation rights. *See Caudill v. Foley*, 21 S.W.3d 203, 213 (Tenn. Ct. App. 1999). Even though the Trial Court found that Mother's relocation did not have a reasonable purpose, we disagree with the Trial Court's conclusion that this necessarily means that Mother was being vindictive and intending to defeat or deter Father's visitation rights. The true reason for the move may not have had anything at all to do with Father and his visitation rights. When the divorce was granted originally and Mother was living in Georgia, the Trial Court stated in its judgment that Father "has had more than standard visitation with the assistance of the mother." Approximately two and one-half years later, when deciding whether Mother's move to Jacksonville was appropriate, the Trial Court specifically stated that Mother had been "very good about allowing the father time with the children" We find nothing in the record to support the Trial Court's conclusion that Mother moved to Jacksonville with the intent to defeat or deter Father's visitation

rights. The preponderance of the evidence weighs against the Trial Court's conclusion in this regard, and the judgment of the Trial Court insofar as it held that Mother was being vindictive because she was trying to defeat or deter Father's visitation rights is reversed.

Having found the presence of one of the three factors set forth in Tenn. Code Ann. § 36-6-108 (d), the Trial Court was required to make a custody determination utilizing the various non-exclusive factors set forth in Tenn. Code Ann. § 36-6-108(e)(1)-(11)⁴, which are:

- (1) The extent to which visitation rights have been allowed and exercised;
- (2) Whether the primary residential parent, once out of the jurisdiction, is likely to comply with any new visitation arrangement;
- (3) The love, affection and emotional ties existing between the parents and child;
- (4) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
- (5) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
- (6) The stability of the family unit of the parents;
- (7) The mental and physical health of the parents;
- (8) The home, school and community record of the child;
- (9) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;
- (10) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; and

⁴ These are the exact same factors set forth earlier in the statute which are to be considered when making a best interest analysis in those situations when parents are spending substantially equal intervals of time with the children and the parents are unable to agree on a new visitation schedule. *See* Tenn. Code Ann. § 36-6-108(c)(1)-(11).

(11) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child.

The court shall consider the availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent. The court shall assess the costs of transporting the child for visitation, and determine whether a deviation from the child support guidelines should be considered in light of all factors including, but not limited to, additional costs incurred for transporting the child for visitation.

Tenn. Code Ann. § 36-6-108(e)(1)-(11).

With regard to the first two factors, it is clear to this Court from the record before us and as found by the Trial Court that Mother has been “very good” about allowing Father to exercise his visitation rights over the past few years. We find nothing in the record to suggest this will change if Mother is allowed to move to Florida with the children. As to the third factor, the record supports a conclusion that there is relatively equal “love, affection and emotional ties existing” between the children and Mother and the children and Father. The fourth factor involves a parent’s disposition to provide food, clothing, medical care, education, and other necessary care to the children. While there was some dispute at trial regarding whether Mother responded timely to a non-emergency dental issue regarding one of the children, the Trial Court nevertheless correctly found that Mother has provided the children with appropriate food, clothing and medical care. With regard to Father, the Trial Court noted that he has had difficulty maintaining employment and his “economic situation, as relates to child support, has been a matter of ongoing concern for the court.”

The fifth and sixth factors caused the Trial Court serious concern as they pertain to Mother. The Trial Court was concerned about Mother’s severing Father’s frequent contact with the children, as well as the contact with the children’s maternal and paternal grandparents. The Trial Court also noted that Mother has been married several times and very little was presented to the Trial Court regarding her current husband. Believing that Father would remain in the Cleveland area, the Trial Court determined Father could provide more stability.

While we share the Trial Court’s concerns, there was no proof offered at trial to suggest that the move to Florida would have any detrimental effects on the children. There was proof offered regarding Mother’s new apartment, which clearly establishes that her residence is more than adequate for raising the children. We also note that Father recently has moved as well, without notifying Mother of his new address, and there was no evidence offered regarding whether his new residence was appropriate for the children, although for present purposes we will assume that it is. Father’s ability to provide a stable environment is questionable given that he has been unable to make full child support payments and is in arrears to the tune of approximately \$4,500. To be sure, any move for a child can be unsettling. However, if we were to deny relocation based on that factor

alone and in the absence of any proof that the children were particularly vulnerable to the potential negative impact of a specific move, then every request for relocation would have to be denied.

Finally, with regard to the eighth factor, the Trial Court noted that the older child had been “thriving” while attending school in Georgia. Once again, there is no proof in the record that this would change if this child attended school in Florida.

After considering all of the relevant factors, we conclude that the preponderance of the evidence weighs against the Trial Court’s conclusion that it is in the best interests of the children for Father to be designated as the primary residential parent. Therefore, we reverse that portion of the Trial Court’s judgment, and we approve Mother’s relocation to Jacksonville while retaining the designation as primary residential parent. On remand, the Trial Court is instructed to fashion an appropriate Parenting Plan. Pursuant to Tenn. Code Ann. § 36-6-108(e) and to the extent possible, the Parenting Plan should give Father annual visitation, at no overall increase in his visitation related expenses, in an amount at least equivalent to that enjoyed by Father when Mother and the children resided in Georgia.

Although not set forth in the statement of issues contained in Mother’s brief, one issue she noted almost in passing was a claim that the Parental Relocation Act is not applicable to her move from Georgia to Florida. Given our ultimate conclusion in this case, this issue is rendered moot and is pretermitted.

Conclusion

The judgment of the Trial Court is affirmed in part and reversed in part, and this cause is remanded to the Trial Court for further necessary proceedings consistent with this Opinion and for collection of the costs below. Exercising our discretion, costs on appeal are assessed one-half against the Appellant, Elizabeth Diaz Graham, and her surety, and one-half to the Appellee Christopher Scott Graham.

D. MICHAEL SWINEY, JUDGE